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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 400

ROBERT OWENS, EUGENE HOWELL, JOSEPH LYLE and ZENOBIA OWENS, a/k/a ZENOBIA MCKINLEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 346 F.2d 329.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1965 (Pet. App. 7). A petition for re-

hearing was denied on June 29, 1965 (Pet. App. 8). The petition for a writ of certiorari was filed on July 27, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether heroin obtained from petitioner Howell by Pennsylvania police was properly admitted into evidence against him.

2. Whether notations of a name and telephone number were subject to seizure as instrumentalities of crime where use of the telephone was an integral part of the conspiracy.

3. Whether the evidence is sufficient to support the conspiracy conviction.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of conspiracy to conceal and sell unlawfully imported heroin in violation of 21 U.S.C. 174 (count 5; R. 12-13, 643-644).[1] Petitioner Lyle was additionally convicted of two substantive narcotics offenses (counts 1-2; R. 10-12, 643-644). Petitioners were sentenced as follows: Owens to 10 years' imprisonment; Howell, as a second offender (R. 69-70), to 12 years; Lyle to 10-year concurrent sentences on each of counts 1, 2 and 5; and Zenobia

[1] "R." designates the Appendix in the court of appeals now on file with this Court.

Owens to 5 years' imprisonment (R. 75, 656-657).[2] The court of appeals affirmed (Pet. App. 1-6).

1. The government's evidence showed that some time in early November 1962, one Marvin Moses met with petitioner Robert Owens and told him that he was "looking for a connection" to purchase a "large quantity of narcotics" (R. 85-86). A few days later, Moses met with Owens and "Red" Thomas, who, according to Owens, could supply Moses' needs (R. 86-87). Thomas told Moses that he could sell him "half a kilo" of heroin for $12,500 and gave Moses a telephone number at which to reach him (R. 87). Thereafter, on "six or seven" separate occasions, Thomas gave Moses large quantities of narcotics on consignment, for which Moses paid him after diluting and selling the goods at a substantial profit (R. 93-95). On at least one occasion when Moses called the telephone number given him by Thomas, Zenobia Owens answered and relayed his message to Thomas (R. 88, 90-91); on other occasions Moses met with Zenobia and gave her the money owing to Thomas (R. 96-97).

On February 14, 1963, petitioners Eugene Howell and Robert Owens were arrested on the Pennsylvania Turnpike by State police (see *infra*, pp. 6-8) who found a quantity of almost "pure" heroin in Howell's right shoe (R. 162-166, 193, 202-203, 248-249, 254-

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[2] Morris "Red" Thomas, who was charged as a co-conspirator (count 5) and with two substantive offenses (counts 3-4), entered a plea of guilty prior to trial on all three counts (R. 3) and was sentenced to concurrent 8-year terms (R. 76-77, 659-663).

255).[3] This heroin was introduced at trial only against Howell (R. 525, 527). Also introduced only against Howell was a statement he made to State authorities at the time of his arrest that he had purchased the heroin in New York and that Owens did not know of the purchase (R. 245-247, 527-528).

In early February 1963, Moses (at this time working as a government informer (R. 118, 122)) introduced undercover narcotics agent Louis Gibson to Thomas as Moses' "runner" who would "take over the action" (R. 97-98, 137). On February 13, Thomas told Gibson that his "people were in New York" and he would take care of the delivery when they returned (R. 139-140). On February 14, when Moses telephoned the number Thomas had given him, Zenobia Owens told him that "Owens and [Howell] had got arrested up in Pennsylvania" and she would have Thomas call him (R. 99-100). That evening Thomas told Moses that he could not then obtain any narcotics because "his men had gotten arrested up in Pennsylvania, and they had the key" (R. 101).

On February 15, agent Dayle had a meeting with petitioner Lyle (R. 330-333, 337-338). Lyle told the agent that he could get him narcotics at $15,000 a kilo but could not make immediate delivery because his "people" had "just got busted on the Pennsylvania Turnpike." He asked whether Dayle knew "Bob Owens" and stated that it did not make any dif-

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[3] Howell entered a plea of guilty to a State charge of possession of these narcotics and was placed on probation (R. 186-188).

ference "whether [Owens was] bsuted or not. He is safe. That goes for his partner, too. * * * Gene and Bob are as safe as you can find." He explained, as to the turnpike incident, that "Bob" did not have much to do "with the whole thing" since they "found the stuff on Gene"; and that he would have heroin available "[a]s soon as they [got] back from Pennsylvania" (R. 340-341). The agent obtained an "ounce" sample of heroin from Lyle that evening (counts 1-2; R. 342-344).

On February 20, 1963, six days after the turnpike incident, Thomas telephoned Moses and said he had his "package" for him. He delivered a quantity of heroin to agent Gibson later that night (R. 101-103; 142-143), and was thereafter seen to enter Howell's apartment in which petitioner Owens was then present (R. 269-270, 347-349, 376, 380-381). Gibson purchased heroin from Thomas on several occasions thereafter, after making arrangements over the telephone, using the number Thomas had given to Moses (*supra*, p. 3). A number of these times, Zenobia answered the telephone and made the arrangements for the meeting (R. 142-150, 350-351). At one of these meetings with "Red" Thomas, after giving him $2,000 for heroin, agent Gibson told him that he had been having a "hard time getting in touch with him" through the previously given telephone number. Thomas agreed that "there had been some difficulty" in getting the telephone messages and told Gibson that he should telephone him at PL 2-7624. He gave the agent a card bearing that telephone number (R. 150-151, 161-162). At the time of their arrests on federal warrants on May 6, 1963, papers bearing this

telephone number and the name "Red" were found at the homes of Howell and Zenobia Owens (R. 273-274, 282, 288, 325).[4] These items were introduced only against the particular defendant on whose premises they were found (R. 296, 525, 527).

On March 22, 1963, Moses introduced agent Dayle to Robert Owens (R. 106, 354-355). Owens told the agent that "Red [was] working for" him; that, at the moment, he and his partner were "in a little difficulty, because [they] got busted along the turnpike"; that, although he was "all right", he did not know how his partner was "going to make out." Owens gave Dayle a telephone number at which he could be reached—the same number that Thomas had given Moses earlier (*supra*, p. 3; R. 356-357).

2. During the trial, petitioner Howell moved to suppress the narcotics seized from him by Pennsylvania police.[5] The pertinent evidence showed that, on February 14, 1963, Howell was arrested for speeding on the Pennsylvania Turnpike while driving with Robert Owens and one Leo Hightower (R. 164-165, 167-170). After the car had been stopped, the officer asked Howell for his operator's permit and the registration certificate (R. 176). Howell showed

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[4] In Howell's case, the notations were in two books lying in open view in his house. In Zenobia Owens' case, the notation was on a slip of paper found in her purse (R. 273-274, 290-291).

[5] Counsel for petitioner Owens withdrew his motion to suppress after government counsel stated that, with respect to the Pennsylvania arrest, he did not intend to introduce at trial "any conversations with defendant Owens. Anything found on the defendant Owens" (R. 173).

the officer his driver's license, but said Owens had the registration (R. 176). Owens then pulled out a registration card from the glove compartment and gave it to the officer (R. 176-177). Owens told the officer that the owner of the car was "a relation to him," Thurmond Starkey (the name appearing on the registration certificate), but that he did not know Starkey's address, although the address was shown on the registration card (R. 177-178). Owens was unable to present any personal identification to the officer (R. 178). Howell, when questioned, said he did not know Starkey (R. 179), and neither he nor Owens was able to show permission to operate the vehicle. The officer, suspecting the car was stolen, asked what was in the trunk and was told a "couple of suitcases" (R. 179-180). To "get more positive identification and proof of ownership of the vehicle" (R. 180-181) the officer had Owens open the trunk. It contained three suitcases, which Owens said were not his but belonged to "a fellow in the car" (R. 180). Owens said he did not believe that the suitcases were locked and the officer or Owens opened one (R. 180-181). The officer immediately saw in plain view in the suitcase a "homemade form of an eye dropper, with a hypodermic needle on the end, fastened with a gum band" (R. 181). The form indicated to the officer that it was not a "commercial needle" used by diabetics, but the kind used by narcotics addicts (*ibid*). Searching further, the officer found a bent spoon "burned on the bottom" and a loaded .38 caliber revolver (R. 182). The three men were then taken to local police headquarters. Howell was

searched and a quantity of almost pure heroin was removed from one of his shoes (R. 183, 193, 202-203, 248-249, 255).[6] The trial court denied the defense motion to suppress this heroin (R. 190).

ARGUMENT

1. The narcotics introduced only as against petitioner Howell (G. Ex. 2A-2C; R. 527) was obtained as a result of a lawful search and seizure by Pennsylvania State police. Howell does not deny that the arresting officer was justified in stopping the car in which he and petitioner Owens were riding for speeding on the Pennsylvania Turnpike.[7] After receiving unsatisfactory responses from Owens and Howell as to who owned the vehicle, the officer was justified in suspecting that the automobile was stolen (R. 181) and therefore properly could proceed to check the contents of the trunk in order to verify Owens' vague assertion that the trunk contained a "couple of suitcases" belonging to "a fellow in the car" (R. 180). Once the officer saw the hypodermic needle in the opened suitcase, he properly suspected a

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[6] This narcotics was introduced at trial only against petitioner Howell (G. Ex. 2A-2C; R. 527). A signed and sworn statement which Howell gave to the local police (R. 211-214, 222-224) was admitted into evidence at trial limited also to petitioner Howell (R. 214, 527-528) and the jury was so instructed (R. 221-222).

[7] 71 Purdon's Penna. Statutes Ann. § 252, authorizes a State police officer, *inter alia*, "[t]o make arrests, without warrant, for all violations of the law, including laws regulating the use of the highways * * *."

narcotics violation. Upon finding the additional narcotics paraphernalia and the loaded revolver, the officer was fully justified in arresting petitioners and taking them to police headquarters where narcotics was discovered in one of Howell's shoes. The police acted at all times on "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar* v. *United States*, 338 U.S. 160, 175; *Draper* v. *United States*, 358 U.S. 307, 313. Accordingly, as the court below found, their conduct was "not unreasonable or violative of the Fourth Amendment" (Pet. App. 4a).

2. The books and slip of paper bearing a telephone number and the notation "Red" were properly seized and admitted into evidence as instrumentalities of the crime charged. The use of the telephone was an integral part of the conspiracy. Arrangements for sales were made by telephone and its use was essential to buyers seeking to purchase narcotics for resale and to the co-consipirators seeking to effectuate their system of distribution. "Red" Thomas had given the number "PL 2-7624" to agent Gibson so that Gibson could more easily communicate with him in connection with their dealings. This same number was found on the papers in the possession of petitioners Howell and Zenobia Owens at the time of their arrests. As the court of appeals ruled, these items "were closely related to the means of communication by telephone essential to the successful conduct of the conspiracy and fall within the class of instrumentalities of crime properly subject to seizure inci-

dent to arrest" (Pet. App. 5). See *Abel* v. *United States*, 362 U.S 217, 237-238; *Marron* v. *United States*, 275 U.S. 192, 199; *United States* v. *Boyette*, 299 F.2d 92, 95 (C.A. 4), certiorari denied *sub nom. Mooring* v. *United States*, 369 U.S. 844; *Grillo* v. *United States*, 336 F.2d 211, 213 (C.A. 1), certiorari denied *sub nom. Gorin* v. *United States*, 379 U.S. 971.[8]

3. The evidence was more than ample to support the verdict on the conspiracy charge. It showed that petitioners Howell and Robert Owens were providing the heroin to salesmen "Red" Thomas and Joseph Lyle. Zenobia Owens acted in a secretarial capacity receiving messages for Thomas, making appointments for heroin transactions, and occasionally taking part in an illegal transaction (see Statement *supra*, pp. 3-6). The fact that not all of the petitioners might have known at any given moment all of the details of the illegal business or the exact duties of other conspirators does not show that the evidence established only "several unrelated episodes" (Pet. 10). On the contrary, the evidence plainly showed that each petitioner was part of the overall plan and that they were bound together "by their common single goal." *Blumenthal* v. *United States*, 332 U.S. 539, 558-559.

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[8] *United States* v. *Lefkowitz*, 285 U.S. 452 and *Stanford* v. *Texas*, 379 U.S. 476, relied on by petitioners (Pet. 7-8), are inapposite, both involving broad exploratory searches. By contrast, the searches involved here were, as the court below found, "for 'Contraband [and] fruits of the crime'" (Pet. App. 5a).

Nor is there any merit to petitioner's claim (Pet. 10-11) that they were prejudiced because two government witnesses (Marvin Moses and narcotics agent Louis Gibson) were allowed to testify to statements of co-conspirator "Red" Thomas made in furtherance of the conspiracy (see R. 87, 92-95, 101-104, 113, 140-144, 148-151) although Thomas was not a defendant at the trial. Once having found that a conspiracy existed,[9] the jury was entitled to consider the acts and declarations of any conspirator (whether he was a defendant or not) in furtherance of the conspiracy as against all of the members thereof. *Lutwak* v. *United States*, 344 U.S. 604, 617; *Krulewitch* v. *United States*, 336 U.S. 440, 442-443.

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[9] At the time of the testimony of Moses and Gibson, statements and acts they attributed to "Red" Thomas were admitted only as "to Thomas' part in the conspiracy" (see, *e.g.*, R. 91-92, 102, 114-115, 141-142).

At the close of the case, the trial judge correctly instructed the jury that it had to "find the existence of a criminal conspiracy" before it could consider the acts and declarations of one conspirator in furtherance of the "common object" against the other conspirators (R. 55-56).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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